77-891

In the Supreme Court of the United States

October Term, 1977

FRANK S. BEAL, Secretary of Welfare of the Commonwealth of Pennsylvania, ROBERT P. KANE, Attorney General of the Commonwealth of Pennsylvania, THE COMMONWEALTH OF PENNSYLVANIA, and F. Emmett Fitzpatrick,
Appellants

vs.

JOHN FRANKLIN, M.D. and OBSTETRICAL SOCIETY OF PHILADELPHIA,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Jurisdictional Statement

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October Term, 1977
No.

FRANK S. BEAL, Secreatary of Welfare of the Commonwealth of Pennsylvania, ROBERT P. KANE, Attorney General of the Commonwealth of Pennsylvania, and THE COMMONWEALTH OF PENNSYLVANIA,
Appellants,

vs.

JOHN FRANKLIN, M. D., and OBSTETRICAL SOCIETY OF PHILADELPHIA,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Jurisdictional Statement

Appellants, FRANK S. BEAL, Secretary of Welfare, ROBERT P. KANE, Attorney General of the Commonwealth of Pennsylvania and THE COMMONWEALTH OF PENNSYLVANIA bring this direct appeal from a Memorandum Opinion and Order dated September 16, 1977, entered by a statutory three-judge court impaneled by the United States District Court for the Eastern District of Pennsylvania. This order declared unconstitutional, *inter alia*, §5 (a) of the Pennsylvania Abortion Control Act, Act No. 209, 35 P.S. §6601 et seq., and permanently enjoined Pennsylvania's law enforcement officials from enforcement of that section.

The order dated September 16, 1977, was the result of a reconsideration of the court's prior action, as mandated by this Honorable Court. The lower court did not expound on its reason for declaring §5 unconstitutional but merely reaffirmed its prior decision in the September 16, 1977 Memorandum Opinion.

Essentially, §5 (a) of the Abortion Control Act, which clearly echoes this Honorable Courts manifest concern for the unborn child in *Roe v. Wade*, 410 U.S. 113 (1973), and in *Planned Parenthood, et al. v. Danforth, et al.*, 428 U.S. 52(1976), required that prior to the abortion procedure the physician make a determination whether or not the fetus is viable. If the fetus is, or may be, viable, then the physician must use that degree of care which protects the life of the unborn child so long as another method would not be necessitated by a concern for the mothers life or health.

This direct appeal presents a crucial, clear and concise issue and raises a substantial federal question which merits plenary review. There was extensive evidence submitted at the trial of this case which would enable this Honorable Court to review a vital issue with a complete and substantial record. Appellants respectfully request this Honorable Court to permit the filing of briefs and the presentation of oral argument on the question presented.

CITATION TO OPINION BELOW

The September 16, 1977 opinion and order issued by the three-judge court are not officially reported. The opinion and order were filed in the United States District Court for the Eastern District of Pennsylvania at Civil Action No. 74-2440. The September 16, 1977 opinion and order is set forth at length in the accompanying Appendix.

The District Court's opinions of September 4, 1975 are reported at 401 F. Supp. 554 (1975),-jdmt vacated 428 U.S. 901(1976). However, for the convenience of the Court, relevant portions of the September 4, 1975 opinions are contained in the Appendix.

JURISDICTION

(i) On September 20, 1974, Appellees filed a class action complaint invoking Federal jurisdiction pursuant to Title 28 U.S.C. §1342 and Title 42 U.S.C. §1983. The complaint sought declaratory and injunctive relief to restrain Appellants and Appellee Fitzpatrick, District Attorney of Philadelphia County, from enforcing the Pennsylvania Abortion Control Act (Senate Bill 1318). The effective date of the Act was October 10, 1974.

Appellees invoked the Federal Court's jurisdiction to prevent the alleged deprivation of "constitutional rights", including the right of personal privacy, due process and equal protection of the laws as secured by the Fourteenth Amendment to the United States Constitution.

Appellees moved for the convention of a three-judge court pursuant to Title 28 U.S.C. 2281. This motion was granted and the Chief Judge of the Court of Appeals for the Third Circuit appointed a statutory three-judge court composed of the Honorable Arlin M. Adams, Circuit Judge, Clifford Scott Green, District Judge, and Clarence D. Newcomer, District Judge.

On September 20, 1974, Appellees moved for a preliminary injunction and the Court below heard oral argument on October 9, 1974. On October 10, 1974, the Court issued a preliminary injunction, restraining the enforcement of certain provisions of the Act.

On October 12, 1974 Appellants filed an application to vacate the preliminary injunction with Your Honorable Court and said action was assigned No. A-285. Appellants' application was denied by Mr. Justice Brennan on December 19, 1974. On January 13, 1975, your Honorable Court denied the application en Banc.

This case was tried pursuant to Title 28 U.S.C. 2284 from January 13, 1975 through January 17, 1975. The Court below heard final arguments and received additional testimony by way of depositions on March 10, 1975.

On September 4, 1975, the Court below filed opinions and issued an order declaring certain provisions of the Pennsylvania Abortion Control Act to be unconstitutional and permanently enjoined appellants from enforcing those provisions. Appellants appealed to this Honorable Court and by order dated July 6, 1976, the judgments entered by the Court below were vacated and the case remanded for reconsideration in light of *Planned Parenthood v. Danforth, supra*.

(ii) On September 16, 1977, upon consideration on remand, the Court below filed a memorandum opinion and issued an order declaring §5 (a) of the Act unconstitutional and permanently enjoined Appellants from enforcing that provision. Appellant filed a timely notice of appeal to this Honorable Court a copy of which appears in the Appendix.

(iii) Title 28 U.S.C. §1253 confers jurisdiction on this Honorable Court to review by direct appeal an order restraining state officials from enforcing a state statute.

(iv) Appellants assert the following cases sustain this Honorable Court's jurisdiction: *Roe v. Wade*, supra; *Planned Parenthoold of Central Missouri, et al. v. Danforth*, supra.

(v) The Abortion Control Act, Act No. 209 of 1974, is officially reported at 35 P.S. §6601, et seq., and 4 Pa. Leg. Serv. 74, 625. Relevant portions of the Abortions Control Act are set forth in this Jurisdictional Statement in the section entitled "Statutory Provisions Involved".

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

"No person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Ninth Amendment to the Constitution of the United States:

"The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

Fourteenth Amendment to the Constitution of the United States, in pertinent part:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED[1]

The Pennsylvania Abortion Control Act, P.L. 209 of 1974 (Senate Bill 1318) is set forth as follows:

"Section 1. Short Title.—This act shall be known and may be cited as the 'Abortion Control Act.'

Section 2. Definitions.—As used in this act: 'Department' means the Department of Health of the Commonwealth of Pennsylvania.

'Facility' means a hospital, health care facility, physician's office or other place in which an abortion is performed.

'Informed consent' means a written statement, voluntarily entered into by the person upon whom an abortion is to be performed, whereby she specifically consents thereto. Such consent shall be deemed to be an informed consent only if it affirmatively appears in the written statement signed by the person upon whom the abortion is to be performed (i) that she has been advised that there may be detrimental physical and psychological effects which are not foreseeable, (ii) of possible alternataives to abortion, including childbirth and adoption, and (iii) of the medical procedures to be used. Such statement shall be signed by the physician or by a counselor authorized by him and shall also be made orally in readily understandable terms in so far as practicable.

'Viable' means the capability of a fetus to live outside the mother's womb albeit with artificial aid.

Section 5. Protection of Life of Fetus.

(a) Every person who performs or induces an abortion shall prior thereto have made a determination based on his

[1]Only the definitional sections of the Act and that section involved in this Appeal are set forth herein.

experience, judgment or professional competence that the fetus is not viable, and if the determination is that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable, shall exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother.

QUESTION PRESENTED

I. Whether the lower court erred in declaring unconstitutional the mandate of Section 5(a) that requires the physician to protect fetal life (when in the physician's "experience, judgment and professional competence...there is sufficient reason to believe that the fetus may be viable") in direct violation of the rights of the viable unborn guaranteed by the Fifth and Ninth Amendments and of the protection which Your Honorable Court granted to the viable unborn child in *Roe v. Wade*, supra, and *Doe v. Bolton*, 410 U.S. 179 (1973), on the erroneous conclusion by the lower court that the safeguard carves out an additional time period of "may be viable"?

STATEMENT OF THE CASE

The Pennsylvania Abortion Control Act (Senate Bill 1318; Act 209 of 1974) was passed into law on September 10, 1974. The law was to be effective within thirty (30) days, on October 10, 1974.

Appellees filed the class action complaint on September 20, 1974. The Plaintiffs were Planned Parenthood of Southeastern Pennsylvania, a corporation involved in abortion referrals, and John Franklin, M.D., a physician who was designated as a representative of an alleged class composed of all Pennsylvania physicians who perform abortions. Dr. Franklin sought to assert the rights of the physicians as well as those of the physicians' female patients. On September 28, 1974, the Court set the hearing on the motion for a preliminary injunction for October 9, 1974. On October 4, 1974, an amended complaint was filed and, in essence, added Concern for Health Options: Information, Care and Education, Inc. (CHOICE), and Clergy Consultation Service of Northeastern Pennsylvania as Plaintiffs in this action. Both of these organizations operate abortion referral services. On October 9, 1974, after oral argument on the motion for preliminary injunction was completed, the Obstetrical Society of Philadelphia moved to intervene as a Plaintiff and this motion was granted by the Court. By order dated September 4, 1975, the Court granted Appellants' motion to dismiss Planned Parenthood, CHOICE and Clergy Consultation Service as Plaintiffs in this action.[2]

The original complaint named the District Attorney of Philadelphia and the Secretary of Welfare as Defendants.[3]

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[2]Consequently, Planned Parenthood, CHOICE and Clergy Consultation Service have been dropped from the caption of this case and are not listed as Appellees before Your Honorable Court.

[3]At the time this action was commenced, Helene Wohlgemuth was the Secretary of Welfare of Pennsylvania. During the course of this litigation, she was replaced in that position by Frank S. Beal, who is designated as one of the Appellants herein.

The Attorney General of Pennsylvania and the Commonwealth of Pennsylvania intervened as Defendants in this action.

At the hearing on the motion for preliminary injunction, no testimony was taken, no affidavits received into evidence, nor any evidence of any nature offered by the Plaintiffs. However, the three-judge court issued a preliminary injunction on October 10, 1974, which restrained the Appellants from enforcing crucial provisions of the Act.

The trial of this case commenced on January 13, 1975 and continued for five full days, concluding on January 17, 1975. During the trial the Court heard actual testimony from five witnesses for Appellees and eleven witnesses for Appellants. Additionally, the Court received testimony by way of depositions from two additional witnesses and affidavits from an additional four witnesses. The majority of the witnesses called in this action were medical specialists, physicians, psychiatrists or social workers and, therefore elaborate expert testimony was elicited on all aspects of abortion procedures.

Judgment was rendered in this case on September 4, 1975, and the Court declared the Act to be severable and upheld the constitutionality of Section 2's definition of "informed consent", Section 3(a), Section 5(c), Section 6(a), Section 6(c) and Section 8. The lower court declared Section 2's definition of "viable", Section 3 (b) (i), Section 3 (b) (ii), Section 5 (a), Section 6 (b), Section 6 (f) and Section 7 unconstitutional. In its order, the Court ruled that a portion of 6 (d) was constitutional and another portion of that section was unconstitutional.

Appellants in the instant appeal have previously appealed to this Honorable Court in a case styled ***Beal, Secretary of Welfare v. John Franklin, M.D. et al.***, filed at

No. 75-709 October Term, 1975. Likewise, the appellees herein had also appealed those portions of the Statutory Court's judgment adverse to them in a case styled ***Franklin, et al. v. Fitzpatrick District Attorney of Philadelphia, et al.*** filed at No. 75-772. By order dated July 6, 1976, this Court affirmed the lower court's judgment in *Franklin v. Fitzpatrick* (No. 75-772) and vacated the District Court's judgment and remanded the present Appellants appeal (No. 75-709) with the following order:

> "The Judgment is vacated and the case is remanded to the United States District Court for the Eastern District of Pennsylvania for further consideration in light of *Planned Parenthood of Central Missouri v. Danforth*, ___ U.S. ___ (1976); *Singleton vs. Wulff*, ___ U.S. ___ (1976), and *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council*, 425 U.S. ___ 1976. Mr. Justice Stewart and Mr. Justice White would note probable jurisdication and set the case for oral argument."

After remand to the lower court, the parties entered into a Stipulation which disposed of all of the remanded issues with the exception of §5 (a), the subject of this appeal, and §7 of the Act relating to governmental subsidy of abortions.[4]

The District Court found that §5 (a) was violative of the United States Constitution in the Memorandum Opinion dated September 16, 1977, a copy of which is contained in the Appendix to this Jurisdictional Statement. Also included in the Appendix is a relevant portion of the Statuory Court's prior opinion relating to §5 (a).

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[4]Appellees have not appealed the Statutory Court's determination that Section 7 was constitutional.

I.

The lower court erred in declaring unconstitutional the mandate of Section 5 (a) that requires the physician to protect fetal life when in the physician's "experience, judgment and professional competence . . . there is sufficient reason to believe that the fetus may be viable" in direct violation of the rights of the viable unborn guaranteed by the Fifth and Ninth Amendments and in violation of the protection which Your Honorable Court granted to the viable unborn in Roe v. Wade, supra, on the erroneous conclusion by the lower court that the safeguard carves out an additional time period of "may be viable".

Section 5 (a) is simply a codification of the *Roe v. Wade*, supra, concept that if an abortion is to be performed after viability, the physician should attempt to preserve the baby's life. This section does not proscribe the performance of abortions, but instead merely puts the physician on notice to consider fetal viability in selecting the abortion *method*. Section 5 (a) requires this particular standard of care only if another method is not contra-indicated for the life or health of the mother. If another method is not so indicated, the Commonwealth asserts that protection of viable fetal life is the compelling state interest described in *Roe v. Wade* and *Planned Parenthood vs. Danforth*, supra.

The lower court erroneously concluded that this standard of care requirement establishes a time period prior to viability during which abortions are prescribed—loosely referred to as the "may be viable" period. This conclusion is clearly unsupported by the evidence and is of no constitutional import since only the abortion method is proscribed and not the performance of the abortion itself. The compelling state interest in the protection of the viable unborn clearly mandates the right of the state to proscribe abortion methods which will endanger the viable child.

CONCLUSION

Appellants submitted at trial extensive evidence concerning the methods of abortion procedures available and their affect on mother and child. There was extensive expert medical testimony concerning the need for medical judgment depending on the circumstances surrounding each pregnancy, a medical view which this Court recognized in *Roe v. Wade*, supra and *Planned Parenthood v. Danforth, et al.*, supra. Appellants submitted that this direct appeal will provide a strong evidentuary basis for an examination of a concise issue relating to viability which would serve as a guide to the state legislative bodies who continue to wrestle with the abortion problem.

Therefore, Appellants respectfully urge this Honorable Court to note jurisdiction in this case and set it for plenary review with briefs and oral arguments on the merits.

Respectfully submitted,

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Attorney for Appellants

CERTIFICATE OF SERVICE

I, the undersigned attorney for Appellants, and a member of the bar of the United States Supreme Court, do hereby certify that pursuant to the Supreme Court Rule No. 33 I have caused to be served true and correct copies of the foregoing Jurisdictional Statement upon each party required to be so served, by depositing said copy in a United States Postal Service mail box, with first class postage prepaid and affixed, addressed as follows:

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PLANNED PARENTHOOD ASSOCIATION OF SOUTH-EASTERN PENNSYLVANIA, INC., et al.,
Plaintiffs
and
OBSTETRICAL SOCIETY OF PHILADELPHIA,
Intervenor Plaintiff
v.
F. EMMETT FITZPATRICK, JR. and FRANK S. BEAL,
Defendants,
and
ROBERT P. KANE and THE COMMONWEALTH OF PENNSYLVANIA,
Intervenor Defendants.

Civil Action No. 74-2400 Class Action

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

TO: THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA:

Pursuant to Rule 10 of the Rules of the Supreme Court of the United States, notice is hereby given that ROBERT P. KANE, FRANK S. BEAL and THE COMMONWEALTH OF PENNSYLVANIA, hereby appeals to the Supreme Court of the United States from that portion of the September 16, 1977, order and final judgment of the Three Judge District Court which permanently enjoined the enforcement of Section 5(a) and Section 5(d) insofar as it

related to Section 5(a) of the Pennsylvania Abortion Control Act, Act No. 209 of 1974, 35 P.S Section 7701 et seq.

This appeal is taken pursuant to 28 U.S.C. Section 1233.

J. JEROME MANSMANN
Special Assistant Attorney General
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601 Grant Street
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(412) 765-2500

CERTIFICATE OF SERVICE

I. J. JEROME MANSMANN, ESQUIRE, hereby certify that I have caused a true and correct copy of the within Notice of Appeal to be served on all counsel of record and the Three Judge District Court by depositing same in the United States Mail, first-class postage pre-paid, addressed as follows:

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Honorable Arlin M. Adams
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Honorable Clarence C. Newcomer
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J. JEROME MANSMANN, ESQUIRE
Special Assistant Attorney General
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601 Grant Street
Pittsburgh, Pennsylvania 15212

OPINION OF THE DISTRICT COURT 9/5/75

• • •

In addition to challenging the definition of viability as being vague, plaintiffs also challenge the right of the legislature to regulate the procedure used where the fetus "may be viable", as evidenced by the language of Section 5(a) and enforced by Section 5(d) of the Act. *Roe* makes it abundantly clear that the compelling point at which a state in the interest of fetal life may regulate, or even prohibit, abortion is not before the 24th week of gestation of the fetus, at which point the Supreme Court recognized the fetus then presumably has the capability of meaningful life outside the mother's womb. Consequently, *Roe* recognizes only two periods concerning fetuses. The period prior to viability, when the state may not regulate in the interest of fetal life, and the period after viability, when it may prohibit altogether or regulate as it sees fit. The "may be viable" provision of Section 5(a) tends to carve out a third period of time of potential viability. Defendants' witness, Dr. Keenan, testified that based upon his interpretation of Act 209, the Act's definition of potential viability occurs at 20 to 26 weeks gestation. (See Tr. 1/17/75, p. 549.) It is clear that in carving out this new time period labeled "may be viable" the state is regulating abortions during the second trimester, when it may lawfully do so only in the interest of maternal health. Yet the state does not claim the provision to be in the interest of maternal health, nor has it shown any connection between this provision concerning fetuses which "may be viable" and maternal health. Clearly, the state seeks to justify this provision only as a measure in furtherance of its claimed interest in protecting potentially viable fetuses. Since this provision does not meet the requirements of *Roe*, we declare it to be unconstitutional.

In reaching our conclusion concerning the issues of viability as defined, and as incorporated in Section 5(a), we

have considered two cases which defendants have cited as upholding similar definitions of viability: *Wolfe v. Schroering*, 388 F. Supp. 631 (W.D. Ky. 1974) and *Planned Parenthood of Central Missouri v. Danforth*, 392 F. Supp. 1363 (E.D. Mo. 1974), *stay grtd.*, 95 S. Ct. 1111 (1974). After examining *Wolfe*, and *Danforth* we are not persuaded by the reasoning of the three-judge courts in either case, but rather we are bound to follow the mandate of the United States Supreme Court in *Roe* and *Doe*. Our decision herein is consistent with the holdings of several other courts. See, for example, *Hodgson v. Anderson*, 378 F.Supp. 1008 (D. Minn 1974), *appeal dismissed*, 95 S. Ct. 819 (1975); and *Leigh v. Olson*, 385 F. Supp. 255 (D. N.D. 1974).

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PLANNED PARENTHOOD ASSOCIATION, et al.,
Plaintiffs
and
OBSTETRICAL SOCIETY OF PHILADELPHIA,
Intervenor Plaintiff
vs.
F. EMMETT FITZPATRICK, JR. and FRANK S. BEAL,
Defendants,
and
ROBERT P. KANE and THE COMMONWEALTH OF PENNSYLVANIA,
Intervenor Defendants.

Civil Action No. 74-2440

MEMORANDUM

Before ADAMS, *Circuit Judge* and NEWCOMER and GREEN, *District Judges.*

(Filed September 16, 1977)

GREEN, *District Judge.*

On September 4, 1975, we filed opinions and an order adjudicating constitutional challenges to specific sections of the Pennsylvania Abortion Control Act (Act)[1]; the parties appealed. The Supreme Court of the United States affirmed the judgment of this Court in regard to plaintiffs' appeal; however, on consideration of defendants' appeal the Supreme Court vacated the judgment entered and remanded to this Court "for further consideration in light of

[1]Act No. 209 of 1974, 35 P.S. §7701, *et seq.*

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. ___ (1976); *Singleton v. Wulff*, 428 U.S. ___ (1976) and *Virginia Citizens Consumer Council*, 425 U.S. ___ (1976)."

We have reconsidered the challenged sections in light of the aforesaid decisions of the Supreme Court and enter an order in compliance therewith. Also, the order entered conforms with the stipulation of the parties, except as it relates to section 5(a) of the Act[2]. Since the parties are unable to agree to the proper resolution of the challenge to section 5(a), they have submitted the issue to the Court, on briefs, for decision.

After reconsideration of section 5(a) in light of the most recent Supreme Court decisions, we adhere to our original view and decision that section 5(a) is unconstitutional[3].

Counsel for the parties have not stipulated as to section 7 of the "Act"[4], electing to have the Court decide the issue after

[2]Section 5 (a) provides:

(a) Every person who performs or induces and abortion shall prior thereto have made a determination based on his experience, judgment or professional competence that the fetus is not viable or if there is sufficient reason to believe that the fetus may be viable, shall exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother.

[3]Planned Parenthood Association v. Fitzpatrick, 401 F. Supp. 554 (1975).

[4]Section 7 provides:

Since it is the public policy of the Commonwealth not to use public funds to pay for unneeded and unnecessary abortions, no abortion shall be subsidized by any State or local governmental agency in the absence of a certificate of a physician, filed with such body, stating that such abortion is necessary in order to preserve the life or health of the mother.

Nothing contained in this section shall be interpreted to restrict or limit in any way, appropriations, made by the Commonwealth or a local

(continued)

consideration of the decisions of the U.S. Supreme Court in *Beal v. Doe*, ___ U.S. ___, 97 S.Ct. 2366, ___ L.Ed.2d ___ (1977) and *Maher v. Roe*, ___ U.S. ___, 97 S.Ct. 2376, ___ L.Ed.2d ___ (1977). We declare section 7 does not violate Title XIX of the Social Security Act, *Beal v. Doe, supra;* nor does section 7 violate the Equal Protection Clause of the Fourteenth Amendment, *Maher v. Roe, supra.*

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government agency to hospitals for their maintenance and operation, or, for reimbursement to hospitals for services performed. 1974, Sept. 10, P.L. 639, No. 209, §7, effective in 30 days.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PLANNED PARENTHOOD ASSOCIATION, et al.,
Plaintiffs
and
OBSTETRICAL SOCIETY OF PHILADELPHIA,
Intervenor Plaintiff
vs.
F. EMMETT FITZPATRICK, JR. and FRANK S. BEAL,
Defendants,
and
ROBERT P. KANE and THE COMMONWEALTH OF PENNSYLVANIA,
Intervenor Defendants.

Civil Action No. 74-2440

ORDER

AND NOW to wit this 16th day of September, 1977, upon consideration of the pleadings, evidence, memoranda filed and in consideration of the stipulation and proposed order counsel filed in this action it is hereby ordered, adjudged and decreed:

I. The following sections of the Pennsylvania Abortion Control Act, Act No. 209 of 1974, 35 P.S. §6601, *et seq.* are constitutional and enforceable as set forth below:

Section 2, definition of Viable.

Section 5(d) insofar as it relates to Section 5(b)

Section 6(b)

Section 6(d) insofar as it relates to the following

information: the name, address, and age of a woman upon whom the abortion was performed, the date on which the abortion was performed, the date upon which determination of pregnancy was made; the approximate age of the fetus and, if applicable, a full statement of the facts upon which the person performing the abortion relied on establishing that the abortion was necessary for the life and health of the mother and insofar as it requires patients consent to be affixed to the facility statement.

Section 7. Also, we declare that Section 7 does not violate Title XIX of the Social Security Act.

II. The following sections of the Pennsylvania Abortion Control Act are unconstitutional and therefore enjoined:

Section 3(b)(i).

Sectio 3(b)(ii).

The first sentence of section 3(e) as it relates to section 3(b).

Section 5(a).

Section 5(d) insofar as it relates to Section 5(a).

Section 6(d) insofar as it requires records regarding information related to the spouse or parent of the woman upon whom the abortion was performed, and insofar as it requires the spousal and parental consents to be affixed to the facility statement.

Section 6(f) except insofar as it prohibits physicians from advertising and the plaintiffs' action on this aspect of Section 6(f) is dismissed without prejudice to the members of the class as certified by the District Court. Plaintiffs

withdraw any challenge to the prohibition of physicians advertising.

BY THE COURT:

/s/ ARLIN M. ADAMS
ARLIN M. ADAMS
Circuit Judge

/s/ CLARENCE C. NEWCOMER
CLARENCE C. NEWCOMER
District Judge

/s/ CLIFFORD SCOTT GREEN
CLIFFORD SCOTT GREEN
District Judge